Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1333

STANDARD ALLIANCE INDUSTRIES, INC.,

Petitioner,

v.

THE BLACK CLAWSON COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Black Clawson Company opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this diversity case because petitioner has advanced no special or important reasons warranting this Court's review.

Statement of the Case

Respondent agrees with petitioner's statement of the case subject to the following corrections and amplifications.

The negotiations for respondent's manufacture and sale and petitioner's purchase of the forging machine spanned

seven months from January to August, 1965. From the start, petitioner wanted respondent to warrant that the machine would forge one railroad car axle of suitable quality every 2½ minutes having certain precise dimensions and specifications. Respondent refused to do that. A forging machine of the kind the parties contemplated had never before been built, and respondent knew nothing of the fine craft of forging.

When respondent refused to warrant the quantity or quality of forgings to be made on the proposed machine, negotiations nearly terminated. The parties were at an impasse. Nevertheless, after its attorneys and executive officers reviewed respondent's final proposal, petitioner agreed to the contract sued on in this case. That document explicitly excluded all implied warranties of fitness and merchantability and further conspicuously declared:

> The quality and quantity of production is not the responsibility of the seller.

Following delivery of the machine, which weighed 175 tons, respondent immediately answered petitioner's written and oral demands that it perform the express contract warranty to repair or replace those parts of the machine which were defective in workmanship or materials or caused deficiencies in the machine's functioning as warranted on page 12 of the contract. For over five months respondent worked at both petitioner's and its own plant making modifications, repairs, and replacements.

Respondent completed performance of the repair and replacement warranty on June 21, 1968. Both respondent and petitioner believed that the former had fulfilled its contract obligations by that date, and respondent left petitioner's plant receiving amicable expressions of appreciation, gratitude, and satisfaction from petitioner.

The machine itself could be operated both manually and by computer. With the latter, computer programs had to be prepared which gave the machine commands as to what types of movements to perform in order to shape the desired end product. Respondent had no obligation to prepare petitioner's computer programs. The machine's output was up to petitioner.

When respondent completed its repairs on June 21, 1968, petitioner advised that it would soon contact respondent by telephone for its assistance in training a computer programmer and for its thoughts regarding different types of programs and forging techniques. Respondent complied with petitioner's request and dispatched James Gardner to petitioner's plant in late June, July, August, and September, 1968 to assist petitioner's employees in preparing computer programs and to discuss forging techniques.

There is no evidence that petitioner at any time after June 21, 1968 notified respondent that it considered the latter's performance of the repair and replacement warranty to be deficient or that it deemed it in breach of that warranty. Instead, petitioner's witnesses uniformly denied that any such notification had been given.

Because of this fatal deficiency in petitioner's case, respondent moved for a directed verdict and judgment notwithstanding the verdict. The District Court never ruled on the motion for a directed verdict and denied the motion for judgment notwithstanding the verdict without opinion.

After its own "independent examination of the record," the Court of Appeals unanimously found that there was no evidence of notification and held that judgment notwithstanding the verdict should have been granted (A21).*

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* The Court of Appeals' opinion is Appendix A to petitioner's brief, and all citations to the Sixth Circuit's opinon are to petitioner's Appendix A.

Precisely the same grounds urged here for a writ of certiorari were dismissed by the Sixth Circuit when it denied petitioner's petition for a rehearing *en banc*, "no judge of this Circuit having voted for *en banc* consideration."

Petitioner here maintains that the Court of Appeals' "independent examination of the record" was deficient and that this Court should now conduct yet another appellate inquiry to see if there is any substantial evidence of notice. Petitioner's plea does not present a reason for a writ of certiorari.

A Writ Should Not Be Issued

1. The Court Of Appeals Did Not Adopt A New Standard For Judgment Notwithstanding The Verdict

Petitioner's first reason for obtaining a writ is that the Court of Appeals purportedly established a new standard for granting judgments notwithstanding the verdict. As petitioner pointed out, the standard is the same under both Ohio and federal law. *See, e.g., O'Day* v. *Webb,* 29 Ohio St. 2d 215, 280 N.E. 2d 896 (1972); *Brady* v. *Southern R. Co.,* 320 U.S. 476 (1943).

The essence of petitioner's claim is that the Sixth Circuit created a new standard in this case because of what it quoted or did not quote from its prior opinion in *Wolfel* v. *Sanborn,* 555 F.2d 583 (6th Cir. 1977). Petitioner openly adopts the standard in *Wolfel* as the correct test, but contends that the Court of Appeals here adopted a different standard because it did not expressly refer to the following portion of that case in its opinion here:

> Where there is conflicting evidence presented sufficient to raise a material issue of fact, a directed verdict should not be granted, and credibility of evidence is not to be considered in making the determination. (555 F.2d at 593)

Petitioner claims that the Court of Appeals "subtly ignored" that portion of the judgment n.o.v. standard quoted above and also contained in *O'Day* v. *Webb, supra,* 29 Ohio St. 2d 215, 280 N.E. 2d 896 (1972). That statement could not be further from the truth. The Court of Appeals explicitly found that there was no issue of conflicting evidence or credibility of evidence in this case:

> The critical issue is whether Black Clawson had notice that it was considered to be in breach. Black Clawson emphatically argues that there is no evidence at all that it received notice of breach after it quit repair work on June 21, 1968. *Standard Alliance directs us to none, and our independent examination of the record reveals none.* (A21; emphasis added)

This is not a case where the appellate court recognized the existence of a conflict in substantial evidence and then allowed a judgment n.o.v. Nor is it one where a reviewing court openly considered the credibility of evidence and then permitted a judgment n.o.v. Instead, this is an action where the parties and the court itself—after its own independent and exhaustive examination of the record—could find no conflict in the evidence and where the question of credibility of evidence never even arose.

The fact is the Court of Appeals here did not "ignore," revise, or truncate the established standard for judgments n.o.v. It did not specifically mention what petitioner claims was ignored because that portion of the standard was unimportant here. As the Court of Appeals noted, not even petitioner could point to any evidence of *notice* (A21).

Since there was a complete absence of evidence on notice, the Court of Appeals properly allowed a judgment n.o.v. under the accepted standard. As Professor Moore has stated:

> The directed verdict is normally used in two overlapping categories of cases. *First, where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense.* This is the situation that historically gave rise to the device of the directed verdict. Second, where there are no controverted issues of fact upon which reasonable men could differ. 5A *Moore's Federal Practice* (2d Ed.) ¶50.02 [1] at p. 2317; emphasis added.

Petitioner has totally misrepresented the Court of Appeals' opinion. The Sixth Circuit did *not* explicitly or implicitly adopt or apply a standard for judgment n.o.v. different from that heretofore established by this Court, other circuits, or the Ohio courts. Indeed, it specifically cited the authorities petitioner is advancing here as stating the appropriate standard (A18).

"There can be but one reasonable conclusion as to the proper verdict" when there is "a complete absence of proof on an issue material to a cause of action." That conclusion is a verdict for the defendant. The Court of Appeals adopted and properly applied the accepted test for judgment n.o.v. in this case.

2. The Court Of Appeals Properly Granted Judgment Notwithstanding The Verdict

Petitioner has not and cannot maintain that this Court should issue a writ of certiorari because the Court of Appeals erroneously decided an important question of state law, or because it decided an issue in conflict with that of another circuit, or because it so egregiously departed from accepted norms of judicial proceedings as to warrant the exercise of this Court's supervisory powers. All petitioner requests is that this Court conduct its own independent and exhaustive examination of the record in this diversity action to see if there is any evidence of substance which would preclude a judgment n.o.v.

Not a single one of the reasons for issuing a writ of certiorari established by this Court in its Rule 19 has been advanced by petitioner. In this breach of contract action arising under Ohio law, all petitioner wants is a determination by this Court that Judges Phillips, Keith, and Merritt did not sufficiently review the extensive record in this case for evidence to support the jury's verdict. To invoke such a reason here is to misconstrue the proper role of this Court in appellate practice. *See generally Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 at 447 et seq. (1959) (Frankfurter, J., dissenting).

The sole basis for petitioner's claim is that the Sixth Circuit either overlooked or improperly evaluated certain evidence. It asserts that, since an inference could arise that respondent had *knowledge* of alleged contract performance deficiencies, an additional inference could be drawn that petitioner gave respondent *notice* that it was claiming a breach of contract. Petitioner's desire to extrapolate one inference from yet another inference should stop further inquiry and require a denial of its petition.

The Sixth Circuit answered petitioner's argument and held that knowledge was not sufficient to establish notice (A21-A23). Its holding is in conformity with those of other circuits and the Ohio courts. *See, e.g., Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957 at 973 (5th Cir. 1976) ("[I]t is not enough under section 2-607 that a seller has knowledge of the facts constituting a nonconforming tender; he must also be informed that the buyer considers him to be in breach of the contract."); *Charles* v. *Judge & Dolph, Ltd.*, 263 F.2d 864 (7th Cir. 1959) (buyer's notice to seller of defects is not notice of breach); *Texas Motorcoaches, Inc.* v. *A.C.F. Motors Co.*, 154 F.2d 91 (3rd Cir. 1946) (buyer must clearly and unambiguously inform the seller that it considers the seller in breach); *American Mfg. Co.* v. *United States Shipping Board E.F. Corp.*, 7 F.2d 565 at 566 (2d Cir. 1925) ("The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of the buyer's claim that they constitute a breach."); *Champion Animal Food Co.* v. *L.B. Reich Distributing Co.*, 78 N.E. 2d 180 at 182 (Ohio App. 1947) (A seller's knowledge of breach is not "evidence of notice of any kind that a claim for damages because of late delivery was ever given."); *Eckstein* v. *Cummins*, 41 Ohio App. 2d 1 at 6, 321 N.E. 2d 897 at 901 (Ohio App. 1974) (The notice must "inform the seller that the transaction is claimed to involve a breach").

Petitioner also argues that the Court of Appeals purportedly "overlooked" evidence that one of respondent's employees was at petitioner's plant on four different occasions after performance of the repair and replacement warranty was completed on June 21, 1968. Again, this statement is incorrect. The Sixth Circuit specifically alluded to that evidence and stated:

> Although the record as to the service calls and backcharge negotiations is sketchy, *see* fn. 7 and 34, there is no evidence that the issue of breach of warranty was ever raised directly, and Standard Alliance does not argue that it was. (A22)

Respondent's employee James Gardner went to petitioner's plant in late June and again in July, August and September at petitioner's direct request that assistance be provided in programming matters and forging methods (725a-726a, 1053a-1055a, 1235a; Exhs. 3700-3701, 3720).* There is no evidence that Mr. Gardner undertook these trips in response to a notice of breach or that, during his visits, petitioner gave the required notice. In fact, petitioner's own witnesses denied that any notice of breach was given after June 21, 1968 when repairs were completed (A21-A22).

Mr. Gardner's visits to petitioner's plant, as the Court of Appeals found, did not constitute evidence of notice of breach sufficient for this case to go to the jury. In *Gunning* v. *Cooley*, 281 U.S. 90 (1930), this Court held:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (281 U.S. at 94).

It is clear that, under both federal and Ohio law, a scintilla of evidence is not sufficient to present a jury

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* The references to the Joint Appendix before the Court of Appeals are attached hereto as an addendum.

question. There must be a conflict in substantial evidence. *See, e.g., Magnat Corp.* v. *B & B Electroplating Co.*, 358 F.2d 794 (1st Cir. 1966); *Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio*, 315 F.2d 467 (4th Cir. 1963); *Moore* v. *Johnson*, 568 F.2d 1184 (5th Cir. 1978); *Lovas* v. *General Motors Corp.*, 212 F.2d 805 (6th Cir. 1954); *Hohmann* v. *Packard Instrument Co., Inc.*, 471 F.2d 815 (7th Cir. 1973); *Hamden Lodge* v. *Gas Co.*, 127 Ohio St. 469, 189 N.E. 246 (1934).

The essence of the petition to this Court is that the three experienced judges on the Sixth Circuit who conducted their own "independent examination of the record" in this diversity breach of contract case erred in failing to draw an inference and in finding certain evidence insufficient to present a jury question. Petitioner has neglected to explain how this circumstance warrants the issuance of a writ here. More important, it has failed to cite any authority that the Court of Appeals did in fact err.

CONCLUSION

Petitioner has not shown and has not seriously maintained that the Court of Appeals devised a new standard for judgment n.o.v. in this case. The essence of its plea is that this Court determine *for this case only* what permissible inferences may be drawn from certain evidence and whether other evidence amounts to more than a scintilla. No attempt was made to explain how a ruling by this Court on any alleged error presented will leave its fresh imprint on anyone other than the two parties to the case.

Petitioner has presented no special or important reasons why this Court should exercise jurisdiction over this diversity case arising under Ohio law. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[ADDENDUM FOLLOWS]

ADDENDUM

Joint Appendix 725a-726a

Q. Now, Mr. Challman, Mr. Romagano and the big mass of Black Clawson employees who were working on the machine leave some time in June, latter part of June, '68.

Will you accept that date? A. I think so, yes.

Q. And then, sir, let's move on into July of 1968.

You were going to have a plant vacation, weren't you, from about the middle of July, 1968 until the middle of August 1968; remember that? A. There was a vacation period in July, yes.

• • •

Q. . . . Romagano and his crew leave toward the end of June. Then we come to July 8th to 11th, and I am asking you if you have a recollection that between July 8th and 11th Jimmy Gardner of Black Clawson came back primarily to work with Bryzgalski and with you, of course, on programming. See if they couldn't improve the programming. And let me tell you a little more, straighten out the axles. Do you remember that? A. Yes, there was a—they had—Jim Gardner had an idea of coming—moving the dies in to hit the hot material after it had been forged to try and improve the straightness on the hot piece of steel or on the hot axle.

Q. You remember that visit now, July 8th to 11th, Gardner? A. Yes, in that vicinity, yes.

Q. Now, Mr. Challman, I'm going to ask Miss Ellis to give you Mr. Gardner's call report of his visit to your plant, being Exhibit 3720, Miss Ellis, please.

(Whereupon, the clerk complied with the request.)

• • •

Q. Is it correct, Mr. Challman, as stated by Mr. Gardner, the reason that he was there, right at the top, the purpose of the call was to try an alternate forging program in an attempt to try to eliminate bending of the product; that's what was going on, wasn't it? A. Yes.

Q. Did you ever learn at any time whether the axles they were able to make on this machine were metallurgically sound in terms of their internal structure? A. No.

Q. Now, there is some mention in here of a bending of the axle that was occurring at this time; is that correct? A. Yes.

Q. Could you tell us do you know anything about what happened subsequent to this? Let me ask you this first: Bending of the axles we are referring to here is an external situation, an actual bending of the axle? A. Yes, on one of the operations it would get a kink or a dog leg in the journal portion of the axle, so instead of having a completely straight piece, it had this dog leg on the end or this kink.

Q. Now, was this being caused by some mechanical malfunctioning of the machine? A. No.

Q. What was causing it and what was done about it, if anything, after the time that you left at the end of June, 1968? A. Why, I think that is covered in more comments in this same report. Mr. Challman indicated that he wanted to think through all of the sequences of the operation and think through his dies and the whole forging technology area, and request that we consider and think about what might be done to eliminate this bending and he would call us about it later.

Q. And did you or your employees render assistance to Mr. Challman after June 21, 1968, to try to help him eliminate the bending of his axles? A. Yes. Even though this was an area that was getting into processing and forging technology and quality of product and so forth, I did permit Jim Gardner, our engineer, to return to Standard Forgings and work on this programming problem with Mr. Challman and, I believe—Mr. Challman certainly. I

don't know if there would have been other people at Standard Alliance.

Q. And Mr. Gardner rendered a report—did he render a report on July 11, 1968 on that subject matter? A. Yes, he did.

Q. And do you know what that report was? A. It was a call report.

Q. I mean the conclusion of that report? A. The conclusion of the report is that there were some changes to the programming and a change made to permit one of the peels to idle and to hold the billet during some of these operations, and the results were that the product was much straighter.

Q. Sir, you were talking about Mr. Gardner. You indicated that you never went back to the plant after June 21; is that correct, sir, of 1968? A. That's right.

Q. Mr. Gardner went back, didn't he? A. Yes.

Q. He went back in July, August and September? A. Approximately July and August. Perhaps September. I am not sure.

Q. And, sir, aside from the call report that was shown to the jury dated July 13 or 14, you don't have any memorandum, do you, of Mr. Gardner's trips in either July, August or September to the Standard Forgings Company of 1968? A. I think we have some July reports, have we not?

Q. That was the one that was a flimsy or a transparency that was shown to the jury of July, I believe, 8 to 11. I am asking you, sir, aside from that one were there any others? A. I believe there is a November report.

Q. November 1. My question, sir, was directed to July, August and September. A. Other than that one in July and November, we have seen no others. Mr. Gardner was in the plant assisting on programming in that period which he had reported.

Joint Appendix of Exhibits—Exhibit 3700-3701

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: 397-6600 (219)

Contacts: H. Challman
W. Gruca

Summary of call: The following tapes were tried with the intent of eliminating or reducing axle bending encountered during body forging: (6-27-68)

1. Tape No. 126 at 120 SPM time 10:30 a.m. (Tape 125 is identical to tape 125 except all body forming operations are done while pushing rather than pulling) Results: Bending was more pronounced. The "dog-leg" appeared during the plunge, and more bending occurred along the pre-form. The program was stopped just after the body forming due to lack of clearance.

2. Tape No. 125 at 180 SPM time 11:00 a.m. (An attempt to establish a speed vs. bending correlation) Results: the normal bend occurred at the pre-form and possibly slightly less occurred at the body forming. There appeared to be no significant relation between—speed and bending.

3. Tape No. 129 at 120 SPM 3:45 p.m. Tape 129 rounds in normal manner, forms No. 1 journal, transfer to No. 2 peel and then forms body (pulling) with 3 passes with body finish die, and forms No. 2

journal. The No. 1 peel clamps the free end at the end of the last body pin to attempt to straighten. Results: the No. 1 journal end remains straight and pre-forming and body finishing perform satisfactorily, however the resulting "dog-leg" at the No. 2 end was not straightened by the No. 1 peel jaws.

4. Tape No. 128 at 120 SPM 4:15 p.m. (tape 128 is identical to 125 with an additional pass over the body and wheel rest with the roughing die). Results: the "dog-leg" bend re-appeared while passing over the body but to a lesser degree. The finished forging was straightr (sic).

Joint Appendix of Exhibits—Exhibit 3720

BLACK CLAWSON HAMILTON DIV.
SALES CALL REPORT

Customer: Standard Forgings

Address: 3444 Dickey Rd.
East Chicago, Ind.

Phone: (219) 397-6600

Contacts: H. Challman
W. Gruca
E. Oakland

Summary of call: Subject—Axle Forging Press The purpose of this call was to try an alternate forging program in an attempt to eliminate bending of the product. (Challman elected to delay any runs during this week of 7-1 due to the holiday and their shutdown on 7-5). The program involves turning the No. 1 peel with the No. 2 peel while both grip the product. The installation of a two-way valve was necessary to allow the No. 1 peel to free-wheel. This work was completed on 7-9 (Tues.) and some dry runs were made to check the tapes and the free-wheeling action. The program appeared satisfactory and so a decision was made to heat up the furnace and run axles on 7-10 Wed.). A total of 8 billets were run and all appeared to be straight and reasonably to size. The bending could be detected during the pre-form or body finish process and shock on the peels appeared less than normal. The ends were cut off and the 8 axles were centered and checked (last line unclear).